United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2260

In The

United States Court of Appeals

For The Second Circuit

NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC., et. al.,

Plaintiff-Appellees,

vs.

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, et. al.,

Defendants-Appellees.

PHARMACEUTICAL SOCIETY OF THE STATE OF NEW YORK, INC., MOE GARTNER, LAWRENCE BLANK & VINCENT J. MORENO,

Applicants for Intervention-Appellants.

JOINT BRIEF FOR APPELLANTS

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JOINT BRIEF FOR APPELLANTS

PRELIMINARY STATEMENT

The decision herein appealed from was rendered by Judge Edmund Port of the Northern District Court. His opinion is unreported.

STATEMENT OF THE ISSUES

I. Whether appellants, a pharmaceutical association and several individual pharmacists, were entitled to intervene as of right in this action brought by consumers against the New York State Board of Regents to enjoin the Board's enforcement of a statewide regulation banning the price advertising of prescription drugs. (The court below denied intervention).

II. Whether the court below abused its discretion in denying appellant pharmaceutical association and individual pharmacists permission to intervene in this action brought by consumers against the Board of Regents to enjoin enforcement of a statewide ban on the price advertising of prescription drugs. (The court below denied leave to intervene but permitted applicants for intervention to file briefs as amici curiae).

STATEMENT OF THE CASE

a) The Nature of the Case

This is an action brought by individual consumers and a consumer "advocacy" organization under 42 U.S.C. 1983, 28 U.S.C. 1331, 1343(3), 2201 and 2281 to obtain declaratory and injunctive relief against an allegedly unconstitutional statewide regulation. The regulation forbids pharmacists to advertise the prices at which they will dispense prescription drugs.

Plaintiffs (hereinafter "the consumers"), claim that the regulation causes them economic harm (Complaint at 7a) and that it constitutes an impermissable infringement by the state upon their right, guaranteed by the First Amendment to the United States Constitution, to free access to vital price information. Id. The second legal contention of the consumers is that this regulation violates the substantive due process guarantees of the Fourteenth Amendment, because it is an arbitrary measure bearing no reasonable relation to a permissible legislative goal. Id. at ~~3-4~~.

Defendants (hereinafter "The Regents") are members of the New York State Board of Regents, the administrative

body which promulgated and which bears the duty of enforcing the advertising ban. Id. at ~~X~~ 5a-6a

Applicants for intervention, the appellants here, are three individual pharmacists and a statewide incorporated association of pharmacists. They allege that the court's disposition of this case could cause them grave economic and professional harm. (*Motion to intervene at ~~V~~ 15a); Affidavit of Rubino at ~~X~~ 23a); Affidavit of Gartner at ~~X~~ 25a); Affidavit of Moreno at ~~X~~ 29a); Affidavit of Blank at ~~X~~ 31a). They seek to intervene as parties defendant to argue the constitutional validity of the regulation under attack. (Motion to intervene at ~~V~~ 15a-16a).

b) The Course of the Proceedings.

The complaint herein was filed April 18, 1974; the answer of defendant Regents, on May 13, 1974. Application for intervention on behalf of all the appellants (hereinafter "The Pharmacists") was made June 6, 1974. At the time of this application, the court had not taken any action in the case, nor had any of the original parties made application to it, by motion or otherwise, for any action.

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* Numbers in parenthesis refer to pages of the respective entries in the Appendix.

The Regents consented to intervention by the Pharmacists (Defendants' Response to Motion for Intervention at 43a-44a), but the consumers opposed it. (Plaintiffs' Response to Motion for Intervention at 32a). On June 24, 1974, Judge Edmund Port indicated he would deny the motion for intervention but would permit the Pharmacists to file briefs as amici curiae. A written order incorporating this decision was signed July 31, 1974, and entered in the docket on August 8, 1974.

A joint notice of appeal from this order was filed August 27, 1974 on behalf of all the applicants for intervention. Proceedings below have not been stayed pending this appeal.

c) Statement of Facts

New York law forbids anyone to dispense prescription drugs without a pharmacist's license, N.Y. Education Law §§ 6801, 6803. (McKinney 1972), or to possess such drugs without having secured registration as a pharmacy, wholesaler, etc. Id. § 6808 (1) (McKinney, 1972).

Once granted, a pharmacist's license may be revoked by the Regents for "professional misconduct," Id., § 6511 after the prescribed hearing procedures, Id. § 6510.

The Regents are given authority to define "professional misconduct" by rule or regulation, id. § 6509 (9), § 6506(1).

Acting under the above authority, the Regents have approved regulations which define "unprofessional conduct in the practice of pharmacy" as including, inter alia:

> "advertising of fixed fees or prices for professional services or the use of the words 'cut rate', 'discount' or other words having a similar connotation in connection with the offering of professional services by a pharmacist, the owner of a pharmacy, (etc)..."

8 N.Y.C.R.R. § 63.3(c).

The original parties to the present action agree, although the Pharmacists do not, that this regulation directly causes a lack of prescription drug price advertising in New York. (Complaint, para. 11 at 6a; Answer, para. 3 at 9a). Individual plaintiffs, alleging themselves to be New York residents and users of prescription drugs (Complaint, para. 5-7 at 5a), that the above regulation causes them economic harm. (Complaint, para. 12 at 7a). Organizational plaintiff makes the

same claim on behalf of its consumer-members. (Id.)

The claim of economic harm, though made in conclusory form, may perhaps fairly be inferred to allege that consumers presently pay high prices for prescription drugs at many pharmacies, and that these prices, which vary widely from store to store, would decline and show less variation if the advertising ban were repealed. ~~Cf. Affidavit of Kronmen at 2; Affidavit of Winkelman at 2.~~

The Consumers also claim that the advertising ban infringes on their First Amendment right of access to price information (Complaint, para. 13 at 7a ~~8~~). They further allege that it is an arbitrary measure, without any reasonable relationship to any permissible legislative purpose, and so forbidden under the substantive due process guarantees of the Fourteenth Amendment. (Id. para. 14 at 7a ~~3-4~~). The Regents answer that "the rules and regulations governing the practice of pharmacy in the State of New York provide a fair and adequate means whereby consumers can ascertain the prices of prescription drugs, while prohibiting false and fraudulent

advertising, bait advertising, and other commercial advertising of prescription drugs by pharmacists." (Answer, para. 6 at 13a). They note that both state law and the regulations of the Regents require that pharmacists post prescription drug prices in their shops. N.Y. Education Law § 6826 (McKinney Supp; 1973); 8 N.Y.C.R.R. § 63.3m; Answer, para. 5 at 10a-12a).

The Pharmacists, in affidavits submitted with their application to intervene, assert that they have a vital professional and economic stake in the present case. (Affidavits of Gartner, Moreno & Blank at 24a-31a). Association intervenor makes similar allegations on behalf of its membership in an affidavit executed by its executive secretary. (Affidavit of Rubino at 22a-23a). This affidavit described the purposes of the association--intervenor to be "to write the reputable pharmacists of the State for mutual assistance...to develop pharmaceutical talent... and ultimately to restrict the practice of pharmacy to properly qualified pharmacists." Id.

The proposed answer submitted by applicants for intervention substantially follows that of the Regents, except that the Pharmacists deny, as the Regents do not,

Paragraph 11 of the Complaint (Intervenors' Answer, para. 12 at 19a). And, the Pharmacists add a "Ninth Defense" not found in the Regents' Answer. Id. para. 16 at 20a. The Pharmacists' Ninth Defense suggests that the Fourteenth Amendment may protect the pharmacists by its due process and equal protection provisions in that to remove the pharmacists' protection from commercial advertising while other professionals such as physicians, attorneys, nurses, etc., remain protected by New York Statute, would subject them to unconstitutional discriminatory treatment.

ARGUMENT

a) Argument Concerning Intervention of Right.

The Pharmacists brought their application for intervention under Fed. R. Civ. P. 24. That rule, insofar as it treats of intervention of right, provides as follows:

> "A. Upon timely application anyone shall be permitted to intervene in an action:
> (1) When a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

The pharmacists do not claim any right under Rule 24a(1); they do claim to meet the requirements of Rule 24a(2).

There can be no serious issue as to the timeliness of their application, and no challenge to it upon that ground was made below.

Neither can there be any question about the appealability of the order denying intervention. Ionian Ship-

ping Co. v. British Law Ins. Co., 426 F.2d 186, 188-189 (2d Cir. 1970). In Ionian, the court dealt with a case in which injunctive relief could only be granted or denied by a three-judge panel, 27 U.S.C. § 2281, from which appeal lies to the Supreme Court, 28 U.S.C. § 1253. Yet, there is no doubt that this order denying intervention is properly reviewable here, in the Court of Appeals, 28 U.S.C § 1291; Francis v. Chamber of Commerce, 481 F. 2d 192 (4th Cir. 1973); NAACP v. New York, 413 U.S. 345 (1973) (allowing direct Supreme Court review of denial of intervention, under a special statute).

The issues, as to whether the pharmacists may intervene of right, are then these:

Were the Pharmacists persons claiming "an interest in the...transaction which is the subject of the action"? --Were they "so situated that the disposition of the action may as a practical matter impair or impede their ability to protect that interest"?--Were their interests "adequately represented by existing parties"?

Each of these questions will be examined in its turn.

POINT I

THE PHARMACISTS, AS THE INTENDED ECONOMIC BENEFICIARIES OF THE REGULATION UNDER ATTACK, HAD "AN INTEREST...IN THE TRANSACTION WHICH IS THE SUBJECT OF THE ACTION" WITHIN THE MEANING OF FED. R. CIV. P. 24 (a) (2).

Plaintiffs, who allege that consumers pay more because of the drug advertising ban (Complaint, para. 12b at 3), must recognize the obvious corollary: pharmacists receive more because of it. Thus, pharmacists are at least de facto economic beneficiaries of the regulation challenged by the plaintiffs.

But, pharmacists are not merely the accidental beneficiaries of the advertising ban. Whatever may be the reasons for similar regulations in other states, see annot., 44 A.L.R.3d 1301 (1972), it should be noted that New York has judicially explained its price advertising ban. The regulations were promulgated for the very purpose of shielding independent pharmacists from destructive discount-store competition, so as to preserve them and, with them, the high-quality profession services now enjoyed by the public. Urowsky v. Board of Regents, 76 Misc. 2d 187, 349 N.Y.S.2d 600 (1973).

It has often been held, expressly or by necessary implication, that beneficiaries of legislation or regulation have sufficient "interest" to justify their intervention of right in a suit to enjoin the enforcement of the law or rule from which they profited. See Atlantic Refining Co. v. Standard Oil Co., 304 F.2d 387 (D.C. Cir. 1962) (association of small oil refineries may intervene as defendant in suit by large refinery company against Secretary of the Interior to set aside a regulation which rations imports of foreign crude oil in a manner that protects small refiners); Champ v. Atkins, 128 F.2d 601 (D.C. Cir. 1942) (auto tort judgment creditor may intervene as a defendant in her debtor's action against the Director of Traffic to set aside the financial responsibility law); GMC v. Burns, 50 F.R.D. 401 (D. Hawaii, 1970) (association of automobile dealers may intervene as defendant in G.M.'s lawsuit against state officials, attacking the constitutionality of a dealer-day-in-court law); Holmes v. Virgin Islands, 61 F.R.D. 3, 370 F. Supp. 715 (D.V.I. 1974) (oil refinery company may intervene as defendant in taxpayer's suit

against the territorial government, challenging the validity of legislation allowing the intervenor-company tax benefits in exchange for its pledge to construct a refinery within the jurisdiction); Nader v. Ray, 363 F. Supp. 946 (D.D.C. 1973) (manufacturer and owners of nuclear power plants may intervene in "consumer" action against AEC, contesting the validity of the procedures under which such power plants were licensed); Wolpe v. Poretsky, 144 F.2d 505 (D.C. Cir. 1944), cert. den. 323 U.S. 77 (1944) (abutters may intervene as defendants in landowner's action against Zoning Board to set aside a zoning order); Textile Workers' Union v. Allendale Co., 226 F.2d 765 (D.C. Cir. 1955), cert. den. sub. nom., Allendale Co. v. Mitchell, 351 U.S. 909 (1956) (a high-wage-area employer and a union may intervene as defendants in another employer's lawsuit against the Secretary of Labor to set aside a regulation fixing a minimum wage rate for work done under government contracts). This position is buttressed by decisions in cases such as Norman's on The Waterfront, Inc. v. Wheatley, 444 F.2d 1011 (3d Cir. 1971). There, liquor wholesalers intervened

as defendants, with the consent of the original parties, in an action by a restauranteur against the liquor authorities to set aside a liquor "fair trade" law. It was held that the intervenor had a sufficient interest to appeal from a decree which, by its terms, ran only against the government defendant.

Appellants found no case which held that persons who were the beneficiaries of a rule or law lacked a sufficient interest to intervene, under Rule 24(a), in an action challenging the validity of such rule or law. This apparent unanimity in the authorities is not surprising. Common sense leads one to the same conclusion reached by the draftsmen of the present version of Rule 24(a):

> "If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene..."

28 U.S.C.A. Fed. R. Civ. P. 24, "Notes of Advisory Committee on Rules" at 16. In fact, the Advisory Committee twice cites Altantic Refining Co. v. Standard Oil Co., supra, with approval, Id. at 17, 18, and also cites

Wolpe v. Poretsky, supra, id. at 18.

That one who is "substantially affected in a practical sense" possesses a sufficient "interest" under Rule 24(a) may be also seen from the school desegregation cases. These cases are, generally, in accord that the parents of white school children have sufficient "interest" to intervene as co-defendants beside their school boards, even though such parents may not be able to satisfy the remaining requirements of Rule 24(a). See Smuck v. Hobson, 408 F.2d 175, 178-179 (D.C. Cir. 1969) (granting intervention); United States v. Board of School Commissioners, 466 F.2d 573, 575 (7th Cir. 1972), cert. den., 410 U.S. 909 (1973); Hatton v. County Board of Education, 422 F.2d 457, 461 (6th Cir. 1970) (denying intervention). See also 7A Wright & Miller, Federal Practice & Procedure § 1908 at 508, et seq. (1972).

The Supreme Court does not appear to have discussed the application of Rule 24 to a case of the present type. It has, however, cited Textile Workers' Union v. Allendale Co., supra, with approval in deciding the analogous problem of whether a party who has been the beneficiary

of an N.L.R.B. decision may intervene in the review proceeding brought by an aggrieved party against the Board. It was held that the party prevailing before the Board could intervene of right in the appeal. UAW Local 238 v. Scofield, 382 U.S. 205, 217 n. 10 (1961). Furthermore, although the Supreme Court has held that private intervention in government initiated anti-trust cases will normally violate the twin-enforcement scheme set up by Congress, Sam Fox Publishing Co. v. United States, 366 U.S. 683, 689 (1961), it has also held that a person with an economic stake in the outcome of an anti-trust case has enough of an "interest" in it to satisfy the "interest" requirement of Rule 24(a). Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 135-136 (1967).

Most recently, the Court has held that a union member with a federally recognized right to a fair union election has a sufficient "interest" in the election to intervene of right in a suit brought by the government against the union to set an election aside. The court reached that conclusion even though the statute involved specifically bars anyone but the government from

initiating such a suit. Trbovich v. UMWA, 404 U.S. 528 (1972).

As these authorities indicate, the "interest" requirement of Rule 24(a) is a threshold question similar to the "standing" requirement which a plaintiff must satisfy in an action attacking a federal regulation as violative of a statute or constitutional provision. The Supreme Court has said that the latter requirement is satisfied by showing: (a) that one has suffered, or is threatened with, actual harm; and (b) that one is within the zone of interests arguably protected by the statute or constitutional provision whose authority is being invoked to strike down the regulation. See Data Processing Service v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970). If these tests were applied to determine the Pharmacists "standing to intervene," there is no doubt that the court would find that they were satisfied. And if the authorities discussing Rule 24(a) cited supra were followed, the result would, of course, be the same.

If the individual pharmacists who are applicants for

intervention satisfy the "interest" requirement of Rule 24(a), without question, the applicant, Pharmaceutical Society of New York, may properly assert its members' "interests" in this case. Atlantic Refining Co. v. Standard Oil Co., supra; GMC v. Burns, supra; Investment Company Institute v. Camp, 401 U.S. 617 (1971); National Automatic Laundry & Cleaning Council v. Schultz, 443 F.2d 689 (D.C. Cir. 1971); Sierra Club v. Morton, 405 U.S. 727 (1972).

POINT II

THE PHARMACISTS ARE "SO SITUATED THAT THE DISPOSITION OF THE ACTION MAY AS A PRACTICAL MATTER IMPAIR OR IMPEDE (THEIR) ABILITY TO PROTECT" THEIR INTERESTS, WITHIN THE MEANING OF RULE 24 (a) (2).

In the present case, as in GMC v. Burns, supra; Holmes v. Virgin Islands, supra; Nader v. Ray, supra; Textile Workers' Union v. Allendale Co., supra; and, Atlantic Refining Co. v. Standard Oil Co., supra, there is no way in which the applicants for intervention may protect their interest, except by intervention in the suit challenging the validity of the law or the rule from which they benefit.

While all of the above cases involve the same dilemma confronting the pharmacists in the present action, the best statement of the problem occurs in the school desegregation case of Smuck v. Hobson, supra. If the statement of the court, appearing at 408 F.2d at 180-181, were tailored to the position of the Appellants here, it would read:

> "The intervening pharmacists assert that the Board of Regents should be free to make policy decisions con-

cerning such matters as drug advertising practices without the constraints which would be imposed by a decision below in plaintiffs' favor. If allowed to intervene, they hope to show that the past practices condemned by the plaintiffs did not violate the constitution and hence that no decree barring such practices should be entered.

Should they succeed, the Board of Regents will indeed be freed of certain constraints upon its exercise of discretion in establishing pharmaceutical policy. But if the right to intervene is denied and the relief demanded by plaintiffs is granted by the district court, there is no apparent way for the druggists to pursue their interests in a subsequent lawsuit. True, they could assert - as they intimate in the "Ninth Defense" of their Answer - that the new policies that might be adopted by the Board in compliance with a decree in plaintiffs favor would be unconstitutional. But this would be a sterner challenge than they face as intervenors here: although the new policies might not be constitutionally required, they might also not be unconstitutional. Indeed, the very premise for the intervenors' attack on the plaintiffs' claim is that regulatory authorities can exercise wide discretion without encountering affirmative constitutional duties or negative prohibitions. While the scope of this discretion is

> uncertain, its existence is not: some policies may be constitutionally permissible, and hence immune to attack in a fresh lawsuit, which are not constitutionally required. Since this is so, the intervenors have borne their burden to show that their interests would "as a practical matter" be affected by a final disposition of this case."

To the above, appellants would add only that the "so situated" clause was inserted in Rule 24(a) by the draftsmen of its 1966 revision for the very purpose of approving the results reached in Atlantic Refining Co. v. Standard Oil Co., supra, and Wolpe v. Poretsky, supra. The draftsmen wished to avoid the narrower interpretation of the old rule in such cases as Sam Fox Publishing Co. v. United States, supra. See 28 U.S.C.A. Fed. R. Civ. P. 24, "Notes of Advisory Committee on Rules" at 16, et seq.; Nuesse v. Camp, 385 F.2d 694, 701 (D.C. Cir. 1967); GMC v. Burns, supra at 403-404; Atlantis Development Corp. v. United States, 379 F. 2d 818, 822-826 (5th Cir. 1967); S. Cohn, "The New Federal Rules of Civil Procedure," 54 Geo. L. J. 1204, 1229-1232 (1966); 7A Wright & Miller, Federal Practice & Procedure, Civil § 1908 at 514, et seq.

(1972).

In the light of this legislative history it is, if possible, even clearer that the pharmacists satisfy the "so situated" requirement of the Rule.

POINT III

THE PHARMACISTS' INTERESTS ARE NOT "ADEQUATELY REPRESENTED BY EXISTING PARTIES" TO THIS LAWSUIT, WITHIN THE MEANING OF RULE 24 (a) (2).

Before 1966, Rule 24(a) required that an applicant for intervention demonstrate that "The representation of applicant's interest by the existing parties is or may be inadequate." Rule 24, 329 U.S. 853 (1946). The Rule, as presently in force, provides that intervention shall be granted. . ."unless the applicant's interest is adequately represented by existing parties." (Emphasis supplied).

To some commentators "it seems entirely clear that the effect of this change is to shift the burden of persuasion" onto the opponents of intervention. 7A Wright & Miller, Federal Practice & Procedures, Civil § 1909 at 521. Others insist that the change in wording does not have this effect. 3B Moore's Federal Practice § 24.09-1 (4) at 24-135 to 24-316 (1974).

A number of courts have concurred with the view that the burden has been shifted. See, e.g., Nuesse

v. Camp, supra followed by Smuck v. Hobson, supra at 181; Exchange National Bank v. Abramson, 45 F.R.D. 97, 103 (D. Minn. 1968); Holmes v. Virgin Islands, supra at 4; Moore v. Tangipahoa Parish School Board, 298 F. Supp. 288, 291 (E.D. La. 1969); Peterson v. United States, 41 F.R.D. 131, 133 (D. Minn. 1966). If this view be correct, that the Consumers bore the burden of proving that adequate representation of the Pharmacists' interests would be supplied by the Regents, it should be observed that no factual materials whatsoever going to this question were offered by the consumers. The latter could not, then, be said to have met such a burden. Even if it is determined that the burden remains with the intervenors, that burden is less than what was required under the old rule. This proposition was expressed in Trbovich v. UMWA, supra at 538; n. 10:

> "The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal. See 3B, Moore's Federal Practice, § 24.09-1 (4) (1969)."

See also Note, 1968 Duke L. J. 117, 129.

Wheresoever the burden of persuasion may be, the substantive question remains: What sort of circumstances must obtain for an existing party's representation of an absentee to be found "adequate" or "inadequate"?

The Reporter to the Advisory Committee on Rules explained the "adequacy" requirement in this manner:

> "It might be objected that the 'unless' clause is de trop because the applicant should be his own judge of whether his interest is being adequately represented; but that would break in rudely on ideas of fiduciary representation and contribute, besides, to a cluttering of lawsuits with multitudinous useless intervenors. On the other hand, the question of representation and its adequacy, released from special connection with res judicata, is to be decided without fetishes of form - thus representation may be adequate even though it is not formal - and with due attention to the character of the litigation and to its condition at the time of the application to intervene."
>
> B. Kaplan, "Continuing work of the Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)," 81 Harv. L. Rev. 356 at 403 (1967).

This suggests that an existing party's representation of an absentee will normally be "adequate": (a) when

the existing party has a fiduciary duty to represent the absentee, or, (b) when, considering "the character of the litigation and its condition at the time of the application," the absentee would be a "useless" addition to the proceedings.

In cases of true fiduciary representation, it is necessary to show the presence of such factors as collusion, adversity of interest, or serious negligence on the fiduciary's part, before a court will find his representation of a cestui to be "inadequate." See Peterson v. United States, supra. In the absence of such unusual factors, intervention will be denied to an applicant whose interests, though they have no formal representative in the case, are substantially identical to those of one or more existing parties. See Sierra Club v. Froehlke, 359 F. Supp. 1289, 1336-1337 (S.D. Tex 1973); Shapiro, "Some Thoughts on Intervention Before Courts, Agencies and Arbitrators," 81 Harv. L. Rev. 721 at 747 (1968).

There are, however, numerous cases in which the interest of the absentee, while similar to that of an existing party, is also clearly different from it

in ways which could reasonably be expected to lead to differences in vigor of presentation, in issues to be emphasized, or in trial or appellate strategies to be adopted.

In such cases, the absentee ordinarily is allowed to intervene "unless it is clear that the (existing) party will provide adequate representation" for him. 7A Wright & Miller, supra § 1909 at 524. See, e.g., Ford Motor Co. v. Bisanz Bros., 249 F.2d 22 (8th Cir. 1957) (manufacturer-shipper with a vital stake in rail service may intervene as a defendant in a suit brought by neighborhood residents against a railroad, to shut down a freight yard); Schultz v. United Steelworkers, 312 F. Supp. 538 (W.D. Pa. 1970) (the winner of a union election may intervene as a defendant in an action brought by the Secretary of Labor against his union to set aside the results of that election); Exchange National Bank v. Abramson, supra (The company which hired Attorney A to represent it in a contemplated action against a bank may intervene as a defendant in the bank's suit against A to enjoin him from proceeding with this employment, because of A's prior

involvement as an assistant U. S. attorney in a Grand Jury investigation of the same matter); In Re Oceana International, Inc., 49 F.R.D. 329 (S.D.N.Y. 1969) (the purchaser of personal property at a mortgagee's foreclosure sale was entitled to intervene as a defendant in the debtor's action against the mortgagee to have such sale held fraudulent, overreaching and void).

Of course, the above cases would not be authority for allowing intervention where it is apparent for some reason that the applicant, if admitted, would add nothing to the case that his de facto "representative" is already making. See United States v. I.B.M., 18 Fed. Rules Serv. 2d 537 (S.D.N.Y. 1974) (attorney denied intervention in contempt proceeding against client who, on attorney's advice, refused to permit discovery of alleged "work product"; there, the same attorney who represented the client would represent the applicant for intervention, if the latter were allowed in. Manifestly, this would be a "useless" addition to the case).

In the present case, the Pharmacists liken their position to that of the intervenors in Ford Motor Co. v. Bisanz Bros., supra and similar cases cited supra. The Pharmacists contend that there are sufficent differences in the interests of the Regents to conclude that the latter's representation "may be" inadequate. It has been said that a showing of inadequacy of representation must be especially clear, and must involve a showing of collusion or bad faith, when the applicant for intervention is a private person and the supposed "representative" is a government agency. See Blocker v. Board of Education, 229 F. Supp. 714, 715 (E.D.N.Y. 1964), 7A Wright & Miller, supra § 1909 at 527-531 (1972); Shapiro, supra 81 Harv. L. Rev. at 742.

Despite such statements, appellants submit that cases involving governmental parties representing private absentees cannot be treated as an undifferentiated mass. The general rule, as stated above, does not apply to all cases in which a government unit or subdivision may be involved in litigation. The rule applies only to certain, defined situations. These

situations and circumstances may be distinguished from the controversy now before the court.

There are cases in which the governmental agency, already a party, is asserting the interests of the public at large, or a broad section of it, and the applicant for intervention shows the court no special or salient interest in the controversy that might distinguish his position from that of the rest of the body public. Such, for example, is Arvida Corp. v. City of Boca Raton, 59 F.R.D. 316 (S.D. Fla. 1973) (mere resident/taxpayer cannot intervene in landowner's suit against city, contesting validity of zoning ordinance). Contrast Wolpe v. Poretsky, supra, (abutters, however, may intervene). The Pharmacists are not asserting the general interest at large, but, like the abutters in Wolpe are asserting a narrow, personal, direct involvement.

To this class of cases arguably belong the school desegregation decisions in which individual parents, who show no special interest to set them apart from the rest of the families of the district, are denied intervention as defendants. The School Board is

usually held, in such cases, to represent the absentee adequately. See. e.g., United States v. Board of School Commissioners, supra; St. Helena Parish School Board v. Hall, 287 F.2d 376 (5th Cir. 1961), cert. den. 368 U.S. 830 (1961); Moore v. Tangipahoa Parish School Board, supra. But see Smuck v. Hobson, supra (allowing intervention). In other cases, the applicant for intervention clearly does assert a special interest which is distinct from that of the general public, but the governmental litigant already a party to the case has entered it for the very purpose of fulfilling a statutory mandate to protect the absentee's rights. In these cases, the governmental agency has a quasi-fiduciary responsibility to the would-be intervenor. As with other fiduciaries, there, the adequacy of its representation will be assumed until a clear showing to the contrary can be made. The United State's representation of Negro schoolchildren in desegregation cases may be viewed in this way. See. e.g., United States v. School District of Omaha, 367 F. Supp. 198 (D. Neb. 1973).

Here, it cannot be contended that the Regents are

fulfilling a mandate to represent the Pharmacists. If anything, the opposite is true. The Regents do not have the responsibility of representing the interests of individual, private segments of society. They are charged with the well being of the state populace as a whole. In this sense, the Consumers and Regents claim to represent the same interests. The Pharmacists, on the other hand, put forward the particular needs of a group requiring representation in this matter.

Other cases, such as those initiated by the government under the securities and the antitrust laws, present a situation in which the typical would-be intervenor has both a broad, "public" interest in enforcement of the law, and a narrow, special interest as a competitor or defrauded purchaser of securities. In that class, the special interest is sufficiently distinguishable from the public one represented by the government to make governmental representation inadequate under the reasoning of Ford Motor Co. v. Bisanz Bros., supra, and related cases.

Nevertheless intervention is not granted, because the intervenor's private interest is susceptible of

being defended in a separate action. So, with regard to this, the applicant is not "so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest." His merely public interest in enforcement of the law, however, has no greater stature than that of any member of the public, and this interest will be deemed to be adequately represented by the government in the absence of collusion, gross negligence or other unusual circumstances. See Sam Fox Publishing Co. v. United States, supra; SEC v. Everest Management Corp., 475 F. 2d 1236 (2d Cir. 1972).

Some private applicants for intervention do not seek to litigate any issue of legal right or liability. They merely wish to have a hand in the process of guiding the trial court's discretion in fashioning an equitable remedy, or in accepting one worked out by the existing parties. Unless a trial judge feels he is in need of such guidance, he will find this "discretion-shaping" interest of the absentee to be adequately represented by the governmental party and the other existing parties to the case. See, e.g., Jones

v. Caddo Parish School Board, 487 F.2d 1275 (5th Cir. 1973); Robinson v. Shelby County Board of Education, 330 F. Supp. 837 (W.D. Tenn. 1971), aff'd on other grounds, 467 F.2d 1187 (6th Cir. 1972); Norwalk CORE v. Norwalk Board of Education, 298 F. Supp. 208 (D. Conn. 1968); United States v. Chicago Title & Trust Co., 10 Fed. Rules Serv. 2d 24a51 Case 1, 734 (N.D. Ill. 1966).

Appellants have no quarrel with the strict tests of inadequacy of representation applied in the above classes of cases, but they stress that this strict standard should not be imported into the different sort of situation involved here. In the present case, persons who are the direct and intended beneficiaries of a regulation with an interest clearly distinct from that of the public generally, desire to intervene in a case in which the plaintiffs challenge that regulation's validity.

The existing governmental party to the present case did not enter it pursuant to some particular legislative mandate to protect the interests of the Pharmacists. Quite the contrary. The Regents clearly

appear here as defenders of the public interest, not that of pharmacists as a class. They cannot be said to speak for the pharmacists as quasi-beneficiaries, with a role analogous to that of the express fiduciaries whose right to represent their cestuis was intended to be preserved in present Rule 24(a) (2). See Kaplan, supra.

Indeed, the Regents themselves acknowledge that "the interests of individual pharmacists and those of the Pharmaceutical Society may differ signigicantly from the interests of the defendants." (Defendants' Response to Motion to Intervene).

Can it be said, then, using the second of Kaplan's criteria, Kaplan, supra, that the Pharmacists' intervention in this case would be "useless" for the presentation and elucidation of the issues in which they have a vital concern, and that the denial of intervention was therefore proper?

It is submitted that there is no real doubt, applying the standard of Trbovich v. UMWA, supra that the Pharmacists' interests "may be" inadequately represented by the Regents. Their intervention could not fairly

be called a "useless" one.

The issue before the court below is not whether the advertising ban is wise or foolish, but only whether it is prohibited by some provision of the Constitution. The Regents, however, certainly would have no continuing obligation or inclination to defend, in the name of the people of the State of New York, the constitutionality of a regulation whose wisdom they have come to doubt. See UAW Local 238 v. Scofield, supra at 214, n. 7. Quite the contrary, if the Regents do grow to doubt the wisdom of the advertising ban, they should, and, one presumes would, seek a disposition of this action which would abrogate the ban while leaving the Regents maximum freedom of action in the future.

In Holmes v. Virgin Islands, supra, at 5, the court discussed a highly similar situation:

> ". . .(I)t is not impossible to imagine that, as the litigation develops, the Government might conclude that a new statute passed under unquestionable circumstances might better serve their interest. Or they might conclude that a change in the original plans was warranted and, therefore, the statute need not be vigorously defended. VIRCO [the

> applicant for intervention], on the other hand, has a large, immediate financial interest to protect. It cannot afford to decide that governmental considerations warrant a determination that the law was invalid, with a view toward going ahead later under a new statute.
>
> "In short, it is my judgment that there is a serious possibility that the present representation of VIRCO's position may be inadequate."

Compare the similar reasoning in Trbovich v. OMWA, supra at 538-539.

Even if the Regents remain firmly persuaded of the wisdom of the advertising bar, they may decide that a vigorous defense of its merits might be politically dangerous; threatening to make the Regents look like a "pharmacists' lobby" and jeopardizing public or legislative support for the Regent's work in the many areas over which their jurisdiction extends. To minimize such risks, the Regents may prefer to wage their defense in a manner that stresses formal, politically neutral issues such as jurisdiction, equitable jurisdiction, or the constitutionally permissible scope of administrative discretion.

Compare the highly-similar case of Atlantic Refining Co. v. Standard Oil Co., supra at 391 (D.C. Cir. 1962):

> ". . .[C]ounsel for the Secretary [of the Interior] intends to defend the attack on the validity of § 10(b) on the ground that the Secretary is given a broad delegation of authority and that the exercise of his expert judgment can be disturbed only if it lacks rational basis and that the independent refiners must receive allocations of foreign crude oil great enough to enable them to offset the price differential in favor of foreign crude oil, in order to remain a part of a strong and healthy domestic refining industry.
>
> On the other hand. . .[the independent refinery who sought to intervene] will undertake to meet such attack on § 10(b) by marshalling and presenting the pertinent facts in the highly complex petroleum industry showing. . .how it is essential to their survival, and the ultimate economic consequences to consumers, should § 10 (b) be invalidated."

See also Textile Workers' Union v. Allendale Co., supra.

Yet a willingness to stand up for the merits of the price advertising ban may be crucial in this case, if, the court below demands that a "compelling state interest" in the ban be demonstrated in order

to save it from the consumers' First Amendment attack. See Barrick Realty, Inc. v. City of Gary, 354 F. Supp. 126, 132 (N.D. Ill. 1973), aff'd, 491 F.2d 161 (7th Cir. 1974).

The Pharmacists are obviously more likely to be informed about the day-to-day practice of their profession, about the effect of the advertising ban on it, and about the probable effects of the ban's repeal. This alone should cause the court to find the Regents to be inadequate representatives of the pharmacists. See Atlantic Refining Co. v. Standard Oil Co., supra; GMC v. Burns, supra at 405-406:

> "When a party to the action does not have access to relevant facts available to an intervenor, that party may be unable to represent the intervenor adequately."

See also Bass v. Richardson, 338 F. Supp. 478 at 492 (S.D.N.Y. 1971) (allowing New York City and a public hospital corporation to intervene as co-plaintiffs in an action brought by Medicaid recipients against HEW):

> "Applicants, with their intimate knowledge of procedures in the area which they themselves administer (as opposed

> to receiving benefits), are in a unique position to inform the court as to the factual matters with which it must deal in deciding this case, and also to succinctly present and protect their position. Applicants have specific data and records in readiness; plaintiffs may not even know of their existence."

The court should contrast the present case, in which the court below will have to assess the advertising ban's impact on consumers and pharmacists, with a case in which the only legal issues concern the regularity of internal governmental processes. In the latter type of case the beneficiaries of challenged official action might indeed have nothing to add to the presentation of a governmental defendant. Natural Resources Defense Council Inc. v. TVA, 340 F. Supp. 400, 408-409 (S.D.N.Y. 1971), rev'd on other grounds, 459 F.2d 255 (2d Cir. 1972) (strip miners would have nothing to add to lawsuit by environmentalists in which the sole issue is whether TVA prepared a proper NEPA statement.

Finally, the public interest represented by the Regents is a long-term one. For example, a resolution to this controversy which has the Regents "test out" a suspension of the advertising ban for a few years,

and defers any adjudication of the ban's validity, might well be acceptable to the Regents. The Druggists, however, like the refinery owner in Holmes v. Virgin Islands, supra, have a vital economic stake in the short-run, as well as the long-run, implementation of the advertising ban.

In addition to the preceeding arguments, the following important consideration needs to be stated. Appellants ask the court to consider as a matter of public policy, the important effect its decision in this matter may have on federal-state relations, and on the division of decision-making responsibility between courts and legislatures.

On the one hand, state regulations alleged to be unconstitional should certainly be scrutinized in federal courts and even struck down if necessary.

On the other hand, if the right of the people to govern themselves through state political processes is to be maintained, the federal courts must exercise self-restraint, carefully testing the strengths and the weaknesses of the arguments for striking down a law or a regulation.

Allowing intervention in cases like the present one will help the courts find the weaknesses in the arguments of those who, having lost a political battle, try to win their point in the courts. Denying intervention, however, will systematically filter the information available to the district courts. "Red-hot" advocacy by the plaintiffs will be met by official defenses ranging from the inspired to the pro forma. This filtering will, in turn, inevitably lead to decisions striking down legislation which, under one federal system, should not have been considered.

Such a systematic bias in the direction of judicial infringement on the political process is undesirable. Allowing intervention to the Pharmacists and to those analogously situated would eliminate this bias.

b) Argument Concerning Permissive Intervention.

Permissive intervention is governed by Fed. R. Civ. P. 24(b), which in relevant part provides as follows:

> "Upon timely application anyone may be permitted to intervene in an action. . .

> (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . .In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

There can be no doubt as to the timeliness of the pharmacists' application for intervention. Whether the trial court abused its discretion in denying leave to intervene will then depend upon two questions:

Did the Pharmacists' application satisfy the threshhold requirement of Rule 24(b) that there be "a claim or defense (with) a question of law or fact in common with the main action"? And if so, then were all of the factors which might appropriately be considered in determining an application for intervention so uniformly and manifestly favorable to allowing it, in this case, that the District Court's refusal to do so amounted to a reversible abuse of discretion?

Appellants believe each of these questions should be answered in the affirmative. They are discussed as follows:

POINT IV

THE DISTRICT COURT HAD THE POWER TO GRANT THE PHARMACISTS' APPLICATION FOR PERMISSIVE INTERVENTION, SINCE THE PHARMACISTS MADE A "CLAIM OR DEFENSE" WITH "A QUESTION OF LAW OR FACT IN COMMON WITH THE MAIN ACTION."

This requirement of the Rule appears to have two parts: The applicant for permissive intervention must raise "a question of law or fact in common with the main action," and he must have "a claim or defense."

There is no need to discuss whether "a question of law or fact in common with the main action" is presented by the Pharmacists. It is manifest that their proposed answer deals almost entirely with the identical questions raised by the pleadings of the Consumers and the Regents.

More uncertain is the meaning to be placed upon the Rule's requirement of a "claim or defense." One view, the one appellants urge here, is that these words add nothing to the requirement of "a common question of law or fact," beyond the obvious procedural point that any such "question" must necessarily be presented as a "claim" in an affirmative pleading or a "defense" in a responsive one. Appellants, in adopting this view, naturally do not

claim that the Rule in any way avoids the constitutional requirement of case or controversy. There can, however, be no serious doubt that a "controversy" exists between the Consumers and the Pharmacists. Data Processing Service v. Camp, supra.

On the other hand, one could maintain that the words "claim or defense" limit the court's power to allow intervention to cases in which the appellant has a legally-enforceable right running against one of the existing parties to the case, a right which could be raised as a "claim" or a "defense" in an independent action between the applicant and such existing party.

This latter, restrictive view of the Rule was adopted, after careful consideration, as an alternative holding in an early case denying permissive intervention. Jewell Ridge Coal Corp. v. Local 6167, UMWA, 3 F.R.D. 251 (W.D. Va. 1943).

Nevertheless, there is express authority for the contrary view: that anyone with a clear stake in the outcome of a case has sufficient "claim or defense" to

satisfy Rule 24 (b). Textile Worker's Union v. Allendale Co., supra. And, 24(b) intervention has often been permitted in cases where applicants showed a practical stake in the main action but no discernible legal claim or defense running against any of the other parties. See Moore v. Tangiphoa Parish School Board, supra (white parents allowed to intervene as defendants under Rule 24(b) in desegregation action against School Board); Nuesse v. Camp, supra (State bank commissioner may intervene under Rule 24(b) in private bank's action against Comptroller of the Currency); GMC v. Burns, supra (national auto dealers' association may intervene under Rule 24(b) as a defendant in G.M.'s action to set aside a state's auto-dealers'-day-in-court law as unconstitutional); Bass v. Richardson, supra (city agencies may intervene under Rule 24(b) in medicaid recipients' action against HEW); Wolpe v. Poretsky, supra (abutters must be permitted to intervene under Rule 24(b) in landowner's action against Zoning Board); Groseclose v. Great Northern R.R., 25 F.R.D. 181 (D. Mont. 1960) (union may intervene in employee's action

against railroad to determine Selective Service re-employment rights); Norman's On The Waterfront, Inc. v. Wheatley, supra (affirming a decision in which the court permitted liquor wholesalers to intervene, with the consent of the parties, in an action brought by a restauranteur against liquor authorities to challenge the validity of a "fair trade" law of which the intervenors were beneficiaries).

The Supreme Court has rendered two decisions which make it reasonable to infer that it, too, shares the "liberal" view of the "claim or defense" language of Rule 24(b).

In SEC v. United States Realty & Improvement Co., 310 U.S. 434 (1940) the SEC had sought to intervene under Rule 24(b)(2) in a Chapter XI bankruptcy proceeding in order to urge the court to require the debtor to proceed under Chapter X. The SEC had a statutory role in Chapter X proceedings which it wanted to play in order to protect the public in the debtor's reorganization. The trial court had permitted this intervention. The Supreme Court

approved the grant of intervention, saying that the SEC's stake in the controversy as protector of the public was enough of a "claim or defense" to warrant intervention.

In City of Chicago v. Atchison, T. & S.F. R.R., 357 U.S. 77, 83 (1958), the court recognized that the economic beneficiary of a city ordinance, who had been given leave to intervene below, had standing to appeal from an adverse decision in the Court of Appeals. It would be surprising if the Court had decided this point without also deciding, tacitly, that the initial grant of intervention had been a permissible one.

POINT V

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PERMISSIVE INTERVENTION TO THE PHARMACISTS.

If the district court had the power to grant intervention in the present case, its abuse of discretion in denying intervention may be reversed by this court upon appeal. SEC v. Everest Management Corp., supra; American Pipe & Construction Co. v. Utah, 94 S. Ct. 756, 769, _____ U.S. _____ (1974). And this is so even

though appeal from a decision on the merits of consumers' claim for injunctive relief must go directly to the Supreme Court. Francis v. Chamber of Commerce of the United States, supra.

The standard of review of discretionary action has been stated as follows:

> "...When judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." In Re Josephson, 218 F.2d 174 at 182 (1st. Cir. 1954); McBee v. Bomar, 296 F. 2d 235, 237 (6th Cir. 1961).

The first of such relevant factors, in the present case, is that which is mentioned in Rule 24(b) itself:

> "...In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

While a naked and generalized assertion of delay or prejudice can always be made, there was no particularized

claim in the present case that any delay or prejudice would befall if the pharmacists were allowed to intervene. See Natural Resources Defense Council, Inc. v. TVA, supra. It is true that the proposed answer of the Pharmacists sought to raise one legal question not already presented by the pleadings of the prior parties: Whether the Pharmacists had a Fourteenth Amendment right to State protection from advertising by other members of their profession. (Proposed Answer of Intervenors, "Ninth Defense"). Such new matters could conceivably be said to threaten some delay in the proceedings because of the added time its litigation might require (even if it stretches credulity to label this delay an "undue" one).

But the court below gave no indication that it considered this "Ninth Defense" in denying intervention. The court clearly had the power, if it objected to intervention on this score, to grant the application upon condition that the "Ninth Defense" be stricken from the answer. See Carroll v. American Federation of Musicians,

33 F.R.D. 353 at 354 (S.D.N.Y. 1963); Ionian Shipping Co. v. British Law Ins. Co., supra. This it did not do.

New matters aside, the remaining "delay and prejudice" which might ensue from granting the Pharmacists' application was only that irreducible minimum which must inevitably result from any addition of any party to any case. Such "delay and prejudice" cannot, in and of itself, be legally sufficient to justify the denial of intervention. If it were, there could never be any permissive intervention, and Rule 24(b) would have been written without purpose.

Hence, it is necessary to look at other factors relevant to a decision on this question, to see if any of them might point toward denying the Pharmacists' application.

These other factors, so far as appellants are aware, are the following:

(1) Adequacy of representation. If the Regents adequately represented the interests of the new Pharmacists, permissive intervention might be denied. Moore v. Tangipahoa Parish School Board, supra; Gross v. Missouri & A. Ry.,

74 F. Supp. 242 at 249 (W.D. Ark. 1947). But, in the present case there are strong reasons for denying that the Regents are adequate representatives. (See discussion supra).

Furthermore, the Regents disclaim such a role, and consent to intervention. (Defendants' Response to Motion for Intervention).

(2) Merits of the claim. If the Pharmacists desired to intervene for the sole purpose of pleading a manifestly hopeless cause, permissive intervention could be refused. Hatton v. County Board of Education, supra; Allen v. County School Board, 164 F. Supp. 786, 787-788 (E.D. Va. 1958). But, it is obvious that the Pharmacists' opposition to the Consumers' constitutional claims are not in this "hopeless" category.

(3) Availability of another forum. If the Pharmacists could defend their interests as beneficiaries of the advertising ban in another lawsuit, it might be proper to deny them intervention here. Lipsett v. United States, 359 F.2d 956, 959-960 (2d Cir. 1966).

But, as is discussed supra, the present action is the only possible one in which the Pharmacists may protect their interest.

(4) Whether intervenors have something to add to the case. The Pharmacists have a practical knowledge of conditions in their profession, and of the likely impact of a decision striking down the advertising ban. Hence, the Pharmacists have expertise analogous to that which justified permissive intervention in GMC v. Burns, supra at 406, and Natural Resources Defense Council Inc. v. TVA, supra at 408-409.

(5) Propriety of Amicus Curiae participation. It has been held that in a case, such as the present one, in which the beneficiary of a regulation desire to support it with factual analyses of its impact, it is better to allow intervention as a party than to relegate the beneficiary to Amicus Curiae status. This is because the court should have the benefit of cross-examination of the beneficiary's contentions, rather than receive them in the form of a "Brandeis brief." Russo v. Kirby, 15 Fed.

Rules Serv. 2d 826, 827 (E.D.N.Y. 1971).

(6) The proper role of a federal court reviewing state action. Appellants submit, as they have argued supra, that a federal court should seek the fullest possible discussion of the issues before striking down state legislation or regulation. Intervention by the Pharmacists, as beneficiaries of the regulation under attack, should be permitted to further this discussion.

While recognizing the limited utility of precedents in cases involving the exercise of discretion, appellants nonetheless urge the court to examine two cases which, to all appearances, raised questions identical to those present here. One of these cases granted intervention, GMC v. Burns, supra and the other held that a trial court's failure to grant it amounted to an abuse of discretion, Textile Workers Union v. Allendale Co., supra.

Because all of the factors relevant to the District Court's decision point clearly toward allowing intervention, appellants submit that this court may properly come to a "definite and firm conviction" that a clear error of

judgment was committed below, or, in the alternative, that the trial court based its action upon the erroneous legal conclusion that the Pharmacists had an insufficient "claim or defense" to permit the court to grant 24(b) intervention. See American Pipe & Construction Co. v. Utah, supra at 769.

In either event, reversal is proper.

The Rules of Civil Procedure exists "to secure the just, speedy and inexpensive determination of every action." Fed. R. Civ. P.1. Allowing intervention in this case would not render its disposition materially less speedy, or more costly. Can anyone doubt that it would be unjust to strike down the advertising ban without giving a say in the decision to the very people who (1) are its intended beneficiaries; (2) have a unique and vital stake in its preservation; and (3) have as their sole "representative" in the action a party who declines that honor, and seconds their prayer for intervention?

Unless the words of Rule 24(b) absolutely forbid intervention, the equities of the case demand that judicial

discretion be exercised so as to permit it.

CONCLUSION

The decision of the court below denying the Pharmacists leave to intervene should be reversed, and the case remanded with instructions to permit such intervention, subject to such safeguards and conditions as the protection of the rights of other parties and the expeditious resolution of the case may require.

Respectfully submitted,

DAVID GOLDBERG
Attorney for Appellants

Of Counsel
Alan I. Boockvar

A 201 Affidavit of Service by Mail G LUTZ APPELLATE PRINTERS, INC.

US COURT OF APPEALS: SECOND CIRCUIT

Index No.

NEW YIORK PUBLIC INTEREST RESEARCH GROUP.
Plaintiffs-Apellees,

against

REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Defendants-Appellees.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Karen Giles, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1013 East 180th Street, Bronx, New York

That upon the ~~16th~~ 21st day of October 1974, deponent served the annexed Brief

upon * attorney(s) for

in this action, at *

the address designated by said attorney(s) for that purpose by depositing ~~a~~ 2 true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this ~~16th~~ 21st day of October 1974

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0413050
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

Karen Giles

Print name beneath signature

KAREN GILES

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